

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 16, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1397

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**JOSEPH ANTHUBER
and HELEN ANTHUBER,**

Plaintiffs-Appellants,

v.

**INTEGRITY MUTUAL INSURANCE COMPANY,
a domestic insurance corporation,
and FRIENDLY INN SUPPER CLUB, INC.,
a domestic corporation,**

Defendants-Respondents,

**DONNA SHALALA, Secretary of the Department
of Health and Human Services,**

Defendant.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. BARRON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Joseph Anthuber appeals from a judgment in favor of the Friendly Inn. Anthuber argues: (1) the trial court erroneously exercised its discretion by precluding Anthuber's safety expert from testifying on the issue of Anthuber's negligence; and (2) the trial court erred by admitting irrelevant evidence of criminal activity at locations other than the Friendly Inn. We affirm.

Anthuber was shot and injured by an unknown assailant in the parking lot of the Friendly Inn. He filed an action against the restaurant and its insurer claiming that the Friendly Inn negligently failed to make its premises as safe as reasonably permitted. At trial, over Anthuber's objection, Dennis Gritzmacher, the owner of Gritz'z Pzazz, a restaurant located near the Friendly Inn, testified regarding the extent of criminal activity in the area and at his restaurant. Also, over Anthuber's objection, the trial court received evidence of criminal activity at Gritz'z Pzazz from the Milwaukee Police Department and a statistical breakdown of crime in the district around the Friendly Inn. A jury found Anthuber seventy-five percent negligent and the Friendly Inn twenty-five percent negligent. After a hearing on motions after the verdict, the trial court entered judgment in favor of the Friendly Inn.

During the presentation of Anthuber's case in chief, Walter Buzby, a safety expert, was called to testify regarding Anthuber's negligence. Counsel for Anthuber questioned Buzby:

QYou know that when he saw two individuals in the parking lot he called out to them?

AThat's my understanding, yes.

QDo you fault him for doing that?

ANo sir, I do not.

QWhy not?

[Objection sustained]

QDo you believe that Mr. Anthuber was negligent in the way he acted that night?

[Objection sustained]

Anthuber argues that the trial court committed prejudicial error by excluding Buzby's testimony because such opinion testimony is expressly allowed under RULE 907.04, STATS.¹

The admission of evidence is generally within the discretion of the trial court. *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). To uphold a discretionary decision, "there should be evidence in the record that discretion was in fact exercised." *Id.* (citation omitted).

Regarding the first objection, Anthuber argues that the trial court erred by not permitting him to ask Buzby "why" he did not fault Anthuber for walking to his car. We are unable to address this issue since the excluded evidence was not preserved. In order to preserve excluded evidence for appellate review, an offer of proof must be made unless the substance of the evidence is apparent from the context within which the question was asked. *State v. Williams*, 198 Wis.2d 516, 538, 544 N.W.2d 406, 415 (1996); RULE 901.03(1)(b), STATS. Anthuber made no offer of proof as to why this testimony was relevant or what he was attempting to establish. Further, he makes no viable argument in his brief as to how he was harmed by the trial court's ruling.

Regarding the second objection, Anthuber asserts that RULE 907.04, STATS., allows for expert testimony regarding whether a party was negligent. The trial court correctly excluded this line of questioning. RULE 907.04 was not intended to allow a witness to give legal conclusions. Thus, an expert generally cannot give an opinion as to whether an individual

¹ RULE 907.04, STATS., provides:

Opinion on ultimate issue. Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

was “negligent” because such an opinion would require a legal conclusion. *Lievrouw v. Roth*, 157 Wis.2d 332, 352, 459 N.W.2d 850, 857 (Ct. App. 1990). The trial court did not misuse its discretion by excluding this testimony.

Anthuber also claims that the trial court erred by admitting evidence of criminal activity at other locations near the Friendly Inn. Over Anthuber's objection, the trial court received into evidence incident reports from the Milwaukee police regarding criminal activity at Gritz'z Pzazz. As noted, over Anthuber's objections, the trial court allowed testimony from Dennis Gritzmacher regarding criminal activity at the restaurant. Anthuber argues that this error was compounded by the trial court's refusal to allow Anthuber the opportunity to fully cross-examine Gritzmacher. Finally, Anthuber argues that the trial court erred in receiving into evidence a statistical breakdown of crime in the Friendly Inn's district as well as allowing this report to go into the jury room.

Regarding the incident reports from the Milwaukee Police Department at Gritz'z Pzazz and the Gritzmacher testimony, we agree with Anthuber that this evidence was improperly admitted. Outside the presence of the jury, Anthuber raised an objection to Gritzmacher's testimony, arguing that Gritzmacher would not be able to lay the proper foundation that the premises of the two restaurants were substantially similar. The trial court allowed the testimony with the instruction that defense counsel lay the proper foundation when Gritzmacher is called.² A review of the record reveals that Gritzmacher's testimony was wholly inadequate in establishing that the premises of the two

² The trial court stated:

Now, I don't know these restaurants intimately, but I have gone by both of those on numerous occasions, and I know they're in close proximity to each other. I know that they look fairly similar in size. They may be bigger or smaller one or the other, but they're not that different from my personal knowledge of going past all these.

I assume that Mr. Ratzel [defense counsel] is going to supply that when he has Mr. Gritzmacher on. If he doesn't so supply it, of course, the underpinnings for any opinions that are given by this witness will be thrown out.

restaurants were substantially similar. Further, since the testimony of the police officer hinged on the proper foundation being laid during Gritzmacher's testimony, it should have also been excluded. Although this was error, it does not require reversal.

An error requires a new trial if but for the error the result would have been different. *Bychinski v. Sentry Ins.*, 144 Wis.2d 17, 20, 423 N.W.2d 178, 179 (Ct. App. 1988). We believe that the verdict would not have been different because the trial court properly admitted evidence of a statistical breakdown of crime in the district where the Friendly Inn and Gritz'z Pzazz were located, which, of course, included the incidents of crime at Gritz'z Pzazz. Evidence of prior crimes at or near the locus in question may be admitted to prove that the owner failed (or did not fail) to take reasonable steps to protect patrons caused by the foreseeable acts of third persons. RESTATEMENT (SECOND) OF TORTS § 344 (1965). Further, Anthuber's theory of his case was based, in part, on the Friendly Inn's violation of the safe place statute. Anthuber thus requested WIS J I—CIVIL 8050, which requires the jury to take into account the community crime rate and the extent of assaultive or criminal activity in the area. The jury, therefore, was properly advised of all the crime in the area, including Gritz'z Pzazz.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.